93-871

No. ~ ~ ~

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

SHAROLYN WOOD,

Cross-Petitioner,

v.

ATTORNEY GENERAL OF TEXAS, *et al.*,

Cross-Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

CROSS-PETITION FOR WRIT OF CERTIORARI OF HARRIS COUNTY DISTRICT JUDGE SHAROLYN WOOD

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QUESTIONS PRESENTED

1. Whether this Court should resolve the important federal questions posed under the guaranty clause, the separation of powers doctrine, and the tenth and fourteenth amendments when a state attorney general, in a collusive suit with the plaintiffs, refuses to defend state laws or represent defendant state officials who have been sued in their official capacity, while insisting on his sole right to represent the state's interests, and, while so doing, attempts to change constitutionally prescribed state laws of general application by "settlement" with private plaintiffs enforced by court order in violation of law.

2. Whether this Court should resolve the conflict between the Fifth Circuit Court of Appeals' holding and conflicting precedent by realigning and disqualifying the state attorney general who refuses to defend the state as a matter of policy in a lawsuit brought against it and attempts to "settle" the case and change state laws of general application by "agreement" with private plaintiffs over the objections of named state defendants and defendant-intervenors and in violation of law.

LIST OF PARTIES

The participants in the proceedings below were:

Plaintiffs:

LULAC Local Council 4434
LULAC Local Council 4451
LULAC (Statewide)
Christina Moreno
Aquilla Watson
Joan Ervin
Matthew W. Plummer, Sr.
Jim Conley
Volma Overton
Willard Pen Conat
Gene Collins
Al Price
Theodore M. Hogrobrooks
Ernest M. Deckard
Judge Mary Ellen Hicks
Rev. James Thomas

Plaintiff-Intervenors:

Houston Lawyers' Association
Alice Bonner
Weldon Berry
Francis Williams
Rev. William Lawson
DeLoyd T. Parker
Bennie McGinty
Jesse Oliver
Fred Tinsley
Joan Winn White

LIST OF PARTIES – Continued

Defendants:

Dan Morales, Attorney General of Texas
John Hannah, Secretary of State of Texas
Texas Judicial Districts Board
Thomas R. Phillips, Chief Justice, Texas Supreme Court
Mike McCormick, Presiding Judge, Court of Criminal Appeals
Pat McDowell, Presiding Judge, 1st Administrative Judicial Region
Thomas J. Stovall, Jr., Presiding Judge, 2nd Administrative Judicial Region
B. B. Schraub, Presiding Judge, 3rd Administrative Judicial Region
Olin Strauss, Presiding Judge, 4th Administrative Judicial Region
Darrell Hester, Presiding Judge, 5th Administrative Judicial Region
William E. Moody, Presiding Judge, 6th Administrative Judicial Region
Weldon Kirk, Presiding Judge, 7th Administrative Judicial Region
Clyde R. Ashworth, Presiding Judge, 8th Administrative Judicial Region
Ray D. Anderson, Presiding Judge, 9th Administrative Judicial Region
Joe Spurlock II, President, Texas Judicial Council
Leonard E. Davis

Defendant-Intervenors:

Judge Sharolyn Wood
Judge Harold Entz

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In The

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SHAROLYN WOOD,

Cross-Petitioner,

v.

ATTORNEY GENERAL OF TEXAS, *et al.*,

Cross-Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

CROSS-PETITION FOR WRIT OF CERTIORARI OF HARRIS COUNTY DISTRICT JUDGE SHAROLYN WOOD

Respondent/Intervenor Harris County District Judge Sharolyn Wood ("Judge Wood") files this Cross-Petition for Writ of Certiorari to respectfully show the Court the following:

OPINIONS AND JUDGMENT BELOW

This case is on remand from *Houston Lawyers' Association ("HLA") v. Attorney General of Texas*, 111 S. Ct. 2379

(1991). The *en banc* opinion of the Fifth Circuit is reported at 999 F.2d 831 and is set out at pp. 1a-202a of the Appendix ("App.") filed by Petitioners, the League of United Latin American Citizens ("LULAC") *et al.* (collectively "Plaintiffs"). The panel decision rendered on remand and vacated by the *en banc* Court is reported at 986 F.2d 728 and is set out at App. 203a-486a. The opinion of the United States District Court for the Western District of Texas is not reported and is set out at App. 487a-549a.

JURISDICTION

Judge Wood adopts the Plaintiffs' statement of jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This cross-petition involves Section 2 of the Voting Rights Act, as amended, 42 U.S.C. § 1973, set out in Plaintiffs' Petition ("Pet.") at 2-3, U.S. CONST. AND TEX. CONST. OF 1876, ART. 2 § 1 (separation of powers doctrine), set out in Appendix B ("App. B") hereto at 2b; U.S. CONST. ART. IV § 4 (Guaranty Clause), App. B at 1b; U.S. CONST. AMEND. 10, App. B at 1b; U.S. CONST. AMEND. 14, App. B at 1b, and TEX. CONST. OF 1876, ART. 1 § 3 (equal protection of law), App. B at 2b; U.S. CONST. AMEND. 14, App. at 1b, and TEX. CONST. OF 1876, ART. 1 § 19 (due process of law), App. B at 2b; TEX. CONST. OF 1876, ART. 4 § 22 (powers of the attorney general), App. B at 3b; TEX. CONST. OF 1876, ART. 5 §§ 7 and 7a (election and qualifications of state district

judges), App. B at 3b-5b; ART. 16 § 1 (official oath), App. B at 5b; Art. 17 § 1 (amendment of Texas Constitution), App. B at 5b-7b; former TEX. REV. CIV. STAT. ANN. ART. 4399 (repealed and codified at TEX. CIV. PRAC. & REM. CODE §§ 402.041, 402.045) (Whom to advise), App. B at 7b; former TEX. REV. CIV. STAT. ANN. ART. 4411 (No admission [by attorney general] to prejudice [of state]), (repealed and recodified at TEX. GOV'T CODE § 402.004), App. B at 8b; and TEX. DISCIPLINARY R. PROF. CONDUCT 1.06(b) (conflict of interest), App. B at 8b-9b.

STATEMENT OF THE CASE

The Proceedings Below

The proceedings in this case are accurately stated in the Fifth Circuit's *en banc* opinion, App. 1a-28a. Judge Wood adopts that statement of proceedings but would add that, essentially, this is a vote dilution challenge under § 2 of the Voting Rights Act to Texas' county-wide system for electing state district judges in Texas' nine most populous counties. The case is on remand from *HLA v. Attorney General*, 111 S. Ct. 2379 (1991), in which this Court, reversing an *en banc* majority opinion of the Fifth Circuit, held that a vote dilution challenge may be brought under § 2 to district judge elections. Acknowledging, however, Texas' strong state interest in linking the jurisdiction and electoral base of its district judges and the detrimental effect on minority voting powers of severing that linkage, this Court remanded the case to the Fifth Circuit with specific instructions to determine

whether vote dilution "may be found or remedied" under the totality of the circumstances. 111 S. Ct. at 2380-81.

The case was rebriefed and heard by the original three-judge panel. Fifteen months later, a two-judge majority of that panel affirmed the trial court's finding of illegal vote dilution in eight of the nine target counties. Within a matter of days, the Fifth Circuit vacated the panel majority opinion *sua sponte* and ordered *en banc* review.

Following oral argument, the *en banc* Court issued its opinion and judgment on August 23, 1993, reversing the judgment of the trial court and rendering judgment for the defense. The opinion also rejected attempts by Texas Attorney General Dan Morales and the Plaintiffs to abort *en banc* review and then "settle" the case over the objections of the state officials and Defendant-Intervenors without a judicial finding of illegality in Texas' district judge election system, thereby replacing Texas' constitutionally mandated county-wide election system with their own preferred subdistricting plan. The Court denied Attorney General Morales' and the Plaintiffs' motion to remand this case to the district court for implementation by "consent decree." The Court, however, also denied motions by the Defendant-Intervenors, Judge Wood and Dallas County District Judge Harold Entz ("Judge Entz") to realign Attorney General Morales with the plaintiffs and to expand their intervention as necessary to cover all counties, and it denied Judge Wood's motion to disqualify Attorney General Morales as counsel for the defense.

The Plaintiffs filed a petition for writ of certiorari on the merits and on the Fifth Circuit's refusal to remand on

October 21, 1993. Judge Wood received a copy on November 1, 1993. She files this cross-petition on the Fifth Circuit's denial of her motions to realign and disqualify the Texas Attorney General.

Statement of Facts

The essential facts relevant to this cross-petition for certiorari are set out in the *en banc* opinion of the Fifth Circuit Court of Appeals, App. at 4a-28a, and Judge Wood adopts them. Essentially, the Court detailed and condemned the refusal of Texas Attorney General Morales to defend the state officials sued in this case, his attempts to prevent anyone else from defending the State – specifically including Judge Wood – and his and the Plaintiffs' collusive attempt to enlist the injunctive powers of the Fifth Circuit in imposing their own preferred plan for electing state district judges from subdistricts without any finding of illegality in the present system and in violation of numerous federal and state constitutional provisions and state laws.[1]

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[1] Laws cited by Judge Wood to the *en banc* Court of Appeals which have been violated by Attorney General Morales include the separation of powers doctrine under the Texas and United States Constitutions; the Guaranty Clause, Article IV, § 4, and the Tenth Amendment of the United States Constitution; the equal protection doctrine, Article 1 § 3 of the Texas Constitution and Fourteenth Amendment to the United States Constitution; the due process doctrine, Art. 1 § 19 of the Texas Constitution and Fourteenth Amendment; Art. 17 § 1 of the Texas Constitution (which requires the approval of two-thirds of the Texas legislature, public notice, and a majority vote of the citizens of Texas to amend any provision of the Texas Constitution); Art. 5 §§ 7 and 7a of the Texas Constitution (which prescribe Texas'

Judge Wood adds that when this case was previously before this Court for oral argument on April 22, 1991, *sub nom HLA v. Attorney General* on the issue whether state district judges are "representatives" of their constituents within the meaning of § 2 of the Voting Rights Act, the Assistant Texas Attorney General who argued for the State of Texas at the request of Attorney General Morales expressly refused to defend the *en banc* majority opinion of the Fifth Circuit, which had held that, since district judges are not "representatives" of their constituents, district judge elections are not covered by § 2. The Attorney General averred, "Much to the chagrin of much of the Texas judiciary, many of the people that have intervened on my case, I do not – I anticipate Mr. Pugh – I do not adopt the theory of noncoverage that Louisiana has

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method for electing state district judges); Article 4 § 22 of the Texas Constitution (which provides, "The Attorney General . . . shall *represent* the State in all suits and pleas in the Supreme Court of the State in which the State may be a party."); Attorney General Morales' own oath of office, TEX. CONST. OF 1876 ART. 16 § 1; former article 4399 of the Texas Constitution (repealed and codified at TEX. CIV. PRAC. & REM. CODE §§ 402.041-402.045) (which prohibits the Texas Attorney General from giving advice to private civil counsel or from representing the interests of those challenging the laws of Texas in cases he is bound by his constitutional duty to defend); former article 4411 of Vernon's Revised Texas Statutes, repealed and codified at § 402.004 of the Texas Government Code (which provides, "No admission, agreement or waiver, made by the Attorney General, in any action or suit in which the State is a party, shall prejudice the rights of the State"); and Rule 1.06(b) of the Texas Disciplinary Rules of Professional Conduct (which proscribes conflicts of interest on the part of advocates and prohibits lawyers from switching sides in litigation and choosing to represent the adversary).

adopted or that the Fifth Circuit adopted." Tr. at 28. He went on to argue that the term "representative" is indeed, "capable of covering judges" – the exact opposite of the Fifth Circuit's *en banc* holding in *favor* of the State. Tr. at 45. He expressly repudiated the reasoning of the Fifth Circuit majority, Tr. at 46, introduced a wholly new and incomprehensible argument ostensibly "defending" the State, and offered the opinion that if this Court did not agree with him, "you must remand." Tr. at 46. He also volunteered the information to the Court that since he was having to defend the case, "I'm having a hard time thinking." Tr. at 53. This Court reversed the *en banc* majority opinion of the Fifth Circuit which had been rejected by the State of Texas' own counsel, i.e., the only counsel permitted to argue for the defense.

In reality, the Defendant-Intervenors, Judges Wood and Entz, had sought the interlocutory appeal under 28 U.S.C. § 1292(b) which resulted in the Fifth Circuit's *en banc* opinion and this Court's review when the Texas Attorney General refused to do so, and Judges Wood and Entz – not Attorney General Morales – had taken the lead on appeal. *See* App. at 5a, 19a. When the case reached this Court, the Defendant-Intervenors moved to divide oral argument – a motion strongly opposed by Attorney General Morales. The Court denied their motion and only the Attorney General was heard.

At the May 24, 1993, *en banc* hearing on remand, the Assistant Attorney General refused to argue in support of Texas law and, on direct questioning by the Court, conceded that the Attorney General no longer advocated the defense of the Texas system. At this stage, this suit is

collusive as between the Petitioners and the Texas Attorney General, who share the common goal of subverting Texas law by "settlement" or a sham adversary proceeding.

REASONS FOR GRANTING THE WRIT

1. **The Fifth Circuit Erred in Avoiding the Fundamental Federal Question that Arises When a State Attorney General Explicitly Refuses to Defend State Law and Defendant State Officials, Attempts to Prevent Anyone Else from Defending the State, Adopts the Position of the Plaintiffs in a Lawsuit Against the State and Attempts to Change State Laws by Collusive "Agreement" With the Plaintiffs or a Sham Adversary Proceeding.**

It is a federal question of utmost importance under the Guaranty Clause, the Tenth Amendment, and the doctrines of equal protection and due process of law whether a state attorney general should be realigned as a plaintiff and disqualified as defense counsel when, averring that state law is indefensible and it is his duty to implement his own policy, he refuses to defend state law and defendant state officials, attempts to prevent anyone else from defending the State, and attempts to change the duly enacted laws of the State by collusive agreement with private plaintiff interest groups, enforced by federal court order, without any finding of illegality in the challenged law (and avowedly in order to avoid judicial review of the law) and in violation of numerous federal and state constitutional provisions and statutes.

This Court had occasion in 1992 to deal with the threat posed to federalism by state officials who ratify unconstitutional plans by "consent." *New York v. United States*, 112 S. Ct. 2508, 2431 (1992). On behalf of the Court, Justice O'Connor pointed out that "powerful incentives might lead both federal and state officials to view departures from the federal structure to be in their personal interests" and that the interests of public officials may not coincide with the Constitution's allocation of authority. *Id.* at 2432. She stated, "The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals." *Id.* She indicated that in such a case the seperation of powers, the Tenth Amendment, and the Guaranty Clause would be implicated. *Id.* The situation is even more egregious when a state attorney general, in the absence of a violation of federal law, attempts to implicate the power of the federal judiciary to implement a personal political objective in collusion with private litigants and in violation of many state constitutional and statutory provisions. That is the fundamental issue here.

The Plaintiffs have raised the "settlement" issue in this Court in their petition for writ of certiorari – a tactic that seems certain to fail since there is nothing to remand where there is no illegality. But the fall-back strategy is clearly for Attorney General Morales – who has once refused to defend the *en banc* opinion of the Fifth Circuit in arguments made to this Court and who pointedly refused to defend the State at the *en banc* hearing on

remand – to do the same thing again with the same goal of snatching defeat from the jaws of victory by thwarting the defense of the State of Texas, which he claims sole authority to "represent." This would be a travesty of law and justice and, like Attorney General Morales' prior efforts in this regard, a blatant violation of the spirit and letter of *New York*.

The Court should, therefore, grant Defendant-Intervenor Judge Wood's Cross-Petition for Writ of Certiorari and reverse the Fifth Circuit's denial of her motion to realign Texas Attorney General Morales with the Plaintiffs and to disqualify him as counsel for the State whose interests he repudiates; and it should permit her to defend the State of Texas at oral argument.

2. The Fifth Circuit Erred in Failing to Realign the Texas Attorney General with the Plaintiffs and/or to Disqualify Him and His Staff as Counsel for Texas.

In its *en banc* opinion below, the Fifth Circuit itself soundly condemned the collusive activities of Attorney General Morales in this case, citing numerous extra-legal actions he had taken and numerous authorities – both federal and state – condemning such behavior by the Attorney General. The Court observed, for example, that, having contended that "the Attorney General is the exclusive lawyer for the State of Texas . . . , General Morales also maintains that in his role as lawyer for the State, he need not represent the State's policy makers; he can ignore them and impose his own views." App. at 9a. The Court held, "Texas law does not sanction his actions." *Id.*

It cited its own case, *Baker v. Wade*, 769 F.2d 289 (5th Cir. 1985) (*en banc*), as authority, reminding the Attorney General that in that case it "rejected the very power claimed by this Attorney General." The Court correctly concluded, "The power he would exercise cannot be squared with *Baker*." App. at 11a.

The Court also observed that although "the state courts have had little occasion to face such a bold claim of authority," their decisions (when considering the activities of this same Attorney General, among others) "offer him little comfort." App at 12a. The Court cited *Terrazas v. Ramirez*, 829 S.W.2d 713 (Tex. 1991), in which the Texas Supreme Court refused to allow Attorney General Morales to "settle" a legislative reapportionment case.[2] Citing still to *Terrazas*, the Fifth Circuit held, "No lawyer may forge a settlement agreement over the express objection of his client," specifically over the objection of Chief Justice Phillips of the Texas Supreme Court, a named Defendant, who was forced to hire his own counsel when Attorney General Morales refused to defend his interests or involve him in "settlement" discussions. App. at 14a. Attorney General Morales moved to disqualify the Chief Justice's private counsel.

Reviewing Attorney General Morales' claims of authority to impose his policy views on the state and to bind state officials to that policy, the Court reminded him that "the Attorney General represents the State but does

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[2] This pattern of "settling" federal Voting Rights Act cases by capitulation, then using the federal courts to alter state law without complying with the electoral process required by the State should be disquieting to constitutional scholars.

not make its policies" and that "Texas has been at particular pains to circumscribe the power of the attorney general to make admissions on its behalf." App. at 15a (citing Tex. Gov't Code Ann. § 402.004 (Vernon 1988) and *State v. Reagan County Purchasing Co.*, 186 S.W.2d 128, 135 (Tex. Civ. App. – El Paso 1944, writ ref'd n.r.e.); *United States v. Texas*, 680 F.2d 356, 368 n.17 (5th Cir. 1982). The Court held that Attorney General Morales "cannot ignore his clients and bind the state against their wishes." App. at 18a (citing to *Public Utility Comm'n of Texas v. Cofer*, 754 S.W.2d 121, 125 (Tex. 1988).

The Court also took the Texas Attorney General soundly to task for attempting to "settle" this case and thus deprive Judges Wood and Entz of their right to a judicial determination of the merits of their independently perfected appeals. App. at 18a-21a. And it pointed out that Attorney General Morales' and the Plaintiffs' attempt to use the injunctive power of the Court to achieve a result they were not able to achieve through the political process was an abuse of the legal system. App. at 21a-24a. The Court stated that it could use such power only as "a tailored remedial response to illegality," App. at 24a, which was non-existent, and that it could not put its sanction behind a settlement that was unfair or that "violates constitutional statutes or jurisprudence," App. at 22a, which this one, in its "attempts to avoid constitutional requirements," App. at 27a, plainly did. The Court concluded, "The suggestions that state political groups, unable to muster sufficient political force to change the system can by 'agreement' enlist the preemptive power of the federal court to achieve the same end stands federalism on its head." App. at 28a.

The Fifth Circuit thus accepted Judge Wood's allegation that the activities of Attorney General Morales violated fundamental federal principles and state constitutional and statutory provisions. The Court also expressly recognized the fact that Judges Wood and Entz had "played an important role at trial and have since taken the lead," had standing to pursue the appeal on the merits, and were entitled to a legal determination of the issues (which were the core issues the Plaintiffs seek to have this court review). App. at 5a, 19a-28a.

Nevertheless, despite its unequivocal condemnation of the actions of Attorney General Morales as purported counsel for the defense, the Fifth Circuit, *with no citation except for authority to the contrary,* denied Judges Wood's and Entz's motions to realign, App. at 17a, and Judge Wood's motion to disqualify, App. at 18a. The Fifth Circuit observed "while we have rejected [Attorney General Morales'] claimed power to bind against their will state officials he is charged to represent, he is nonetheless their counsel." *Id.*

The Court made it clear, however, that its denial of the Defendant-Intervenors' motions was provisional and contingent on the Attorney General's actually *representing* the State's interests and not his own. App. at 17a-18a. In provisionally denying the Defendant-Intervenors' motions to realign and disqualify, however, the Court stated, mistakenly, that Attorney General Morales did not purport to represent the Defendant-Intervenors, Judges Wood and Entz. App. at 18a. This was a critical mistake. In reality, Attorney General Morales had vigorously opposed Judges Wood's and Entz's participation in the case on the ground that he himself represented them in

their official capacity as state district judges and that they had no personal standing to defend this case. Indeed, the Attorney General conceded in oral argument that the very terms of his settlement agreement were crafted to attempt to deprive Judges Wood and Entz of standing to pursue this appeal and the Fifth Circuit itself recognized this admission in its opinion. App. at 8a, 18a-19a.

Not only did the failure of the Fifth Circuit to realign and disqualify Attorney General Morales and to permit the Defendant-Intervenors to carry the defense of the State conflict with the Fifth Circuit's own holdings regarding disqualifying activities by a state attorney general and the circumstances under which others may assume the duties abdicated by the Attorney General, it also conflicted with binding opinion of the Texas Supreme Court on the same subject, as the Court's own citations prove.

In addition, the Fifth Circuit's failure to realign Attorney General Morales and disqualify him conflicts with precedent of this Court. In *Coolidge v. New Hampshire*, this Court held that a state attorney general was *per se* disqualified from playing the dual roles of investigating and prosecuting a case on the one hand and adjudicating the issue of probable cause to issue search warrants on the other hand. *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S. Ct. 2032 (1971). It follows *a fortiori* that a state attorney general may not insist on his right to "defend" a state's laws and state officials against a federal suit and, at the same time, declare the challenged state law "indefensible" and declare it his duty as a matter of "policy" to replace it with his personal "consent decree" or "settlement" worked out in collusion with

private plaintiffs over the objections of affected defendant-intervenors and defendant state officials and in violation of federal and state constitutional and statutory principals.

As the facts recited above show, if certiorari is granted in this case, the *en banc* opinion of the Fifth Circuit will not only be without defenders, the voice of the defense will sing the tune of the petitioners. Given the rule of this Court that only one advocate may represent each side at oral argument, the only way to prevent a sham proceeding is for this Court to realign Texas Attorney General Morales as a plaintiff, not a defendant, to disqualify him as counsel for the defense, and to award oral argument to the intervenors – whose briefs and arguments throughout this case have been in full accord with all applicable law and principles of legal ethics and whose commitment to the defense of this case has been unwavering. *See* App. at 19a.

CONCLUSION

At this stage, this is a classic collusive suit where Petitioners and the State Attorney General (although ostensibly adverse) are seeking to overthrow the law of the State of Texas by agreement if possible or by the sham of a purported adverary proceeding if necessary. This Court should not decide important federal questions with only one side present. Respondent Harris County District Judge Sharolyn Wood requests that the Court grant her cross-petition for writ of certiorari and reverse the judgment of the Fifth Circuit Court of Appeals solely insofar

as it denies her motions to realign the Texas Attorney General with the Plaintiffs as a party, and to disqualify him and his staff as counsel for the Defendants. She requests that the Court realign and disqualify the Taxes Attorney General and expand the Defendant-Intervenors' intervention as necessary to cover all target counties and accord oral argument for the defense to the Defendant-Intervenors. Judge Wood finally requests that the Court deny the Plaintiffs' petition for writ of certiorari on the merits of this case, or alternatively, in the event it grants certiorari, that it affirm the *en banc* judgment of the Fifth Circuit Court of Appeals on the merits.

Respectfully submitted,

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APPENDIX

UNITED STATES CONSTITUTION

Section 4. Republican Government

Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

U.S. CONST. ART. 4 § 4.

AMENDMENT X – RESERVED POWERS TO STATES

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. CONST. AMEND. X.

AMENDMENT XIV – CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION

Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

U.S. CONST. AMEND. XIV § 1.

TEXAS CONSTITUTION OF 1876

§ 3. Equal rights

Sec. 3. All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services.

TEX. CONST. OF 1876, ART. 1 § 3.

§ 19. Deprivation of life, liberty, etc.; due course of law

Sec. 19. No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.

TEX. CONST. OF 1876, ART. 1 § 19.

§ 1. Division of powers; three separate departments; exercise of power properly attached to other departments

Section 1. The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one, those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

TEX. CONST. OF 1876, ART. 2 § 1.

§ 22. Attorney General

Sec. 22. The Attorney General elected at the general election in 1974, and thereafter, shall hold office for four years and until his successor is duly qualified. He shall represent the State in all suits and pleas in the Supreme Court of the State in which the State may be a party, ...

TEX. CONST. OF 1876, ART. 4 § 22.

§ 7. Judicial Districts; District Judges; terms or sessions; absence, disability or disqualification of Judge

Sec. 7. The State shall be divided into judicial districts, with each district having one or more Judges as may be provided by law or by this Constitution. Each district judge shall be elected by the qualified voters at a General Election and shall be a citizen of the United States and of this State, who is licensed to practice law in this State and has been a practicing lawyer or a Judge of a Court in this State, or both combined, for four (4) years next preceding his election, who has resided in the district in which he was elected for two (2) years next preceding his election, and who shall reside in his district during his term of office and hold his office for the period of four (4) years, and who shall receive for his services an annual salary to be fixed by the Legislature. The Court shall conduct its proceedings at the county seat of the county in which the case is pending, except as otherwise provided by law. He shall hold the regular terms of his Court at the County Seat of each County in his district in such manner as may be prescribed by law. The Legislature shall have power by General or Special Laws to

make such provisions concerning the terms or sessions of each Court as it may deem necessary.

The Legislature shall also provide for the holding of District Court when the Judge thereof is absent, or is from any cause disabled or disqualified from presiding.

(Amended Nov. 5, 1985.) TEX. CONST. OF 1876, ART. 5 § 7.

§ 7a. Judicial District Board; reapportionment of judicial districts

Sec. 7a. (a) The Judicial Districts Board is created to reapportion the judicial districts authorized by Article V, Section 7, of this constitution.

(b) The membership of the board consists of the Chief Justice of the Texas Supreme Court who serves as chairman, the presiding judge of the Texas Court of Criminal Appeals, the presiding judge of each of the administrative judicial districts of the state, the president of the Texas Judicial Council, and one person who is licensed to practice law in this state appointed by the governor with the advice and consent of the senate for a term of four years. In the event of a vacancy in the appointed membership, the vacancy is filled for the unexpired term in the same manner as the original appointment.

. . .

(i) The legislature, the Judicial Districts Board, or the Legislative Redistricting Board may not redistrict the judicial districts to provide for any judicial district smaller in size than an entire county except as provided by this section. Judicial districts smaller in size than the entire county may be created subsequent to a general

election where a majority of the persons voting on the proposition adopt the proposition "to allow the division of ___ County into judicial districts composed of parts of ___ County." No redistricting plan may be proposed or adopted by the legislature, the Judicial Districts Board, or the Legislative Redistricting Board in anticipation of a future action by the voters of any county.

(Adopted Nov. 5, 1985). TEX. CONST. OF 1876, ART. 5 § 7a.

§ 1. Official Oath

Sec. 1. (a) Members of the Legislature, and all other elected officers, before they enter upon the duties of their offices, shall take the following Oath or Affirmation:

> "I, ___, do solemnly swear (or affirm), that I will faithfully execute the duties of the office of ___ of the State of Texas, and will to the best of my ability preserve, protect, and defend the Constitution and laws of the United States and of this State, so help me God."

TEX. CONST. OF 1876, ART. 16 § 1.

§ 1. Proposed amendments; submission to voters; adoption

Section. 1. The Legislature, at any regular session, or at any special session when the matter is included within the purposes for which the session is convened, may proposed amendments revising the Constitution, to be voted upon by the qualified electors for statewide offices and propositions, as defined in the Constitution and statutes of this State. The date of the elections shall

be specified by the Legislature. The proposal for submission must be approved by a vote of two-thirds of all the members elected to each House, entered by yeas and nays on the journals.

A brief explanatory statement of the nature of a proposed amendment, together with the date of the election and the wording of the proposition as it is to appear on the ballot, shall be published twice in each newspaper in the State which meets requirements set by the Legislature for the publication of official notices of officers and departments of the state government. The explanatory statement shall be prepared by the Secretary of State and shall be approved by the Attorney General. The Secretary of State shall send a full and complete copy of the proposed amendment or amendments to each county clerk who shall post the same in a public place in the courthouse at least 30 days prior to the election of said amendment. The first notice shall be published not more than 60 days nor less than 50 days before the date of the election, and the second notice shall be published on the same day in the succeeding week. The Legislature shall fix the standards for the rate of charge for the publication, which may not be higher than the newspaper's published national rate for advertising per column inch.

The election shall be held in accordance with procedures prescribed by the Legislature, and the returning officer in each county shall make returns to the Secretary of State of the number of legal votes cast at the election for and against each amendment. If it appears from the returns that a majority of the votes cast have been cast in favor of an amendment, it shall become a part of this

Constitution, and proclamation thereof shall be made by the Governor.

(Amended Nov. 7, 1972.) TEX. CONST. OF 1876, ART. 17 § 1.

TEXAS REVISED CIVIL STATUTES & TEXAS CODES

Art. 4399. Whom to advise

The Attorney General at the request of the Governor, or the head of any department of the State government, including the heads and boards of penal and eleemosynary institutions, and all other State boards, regents, trustees of the State educational institutions, committees of either branch of the Legislature, and county auditors authorized by law, shall give them written advice upon any question touching the public interest, or concerning their official duties. . . . He is hereby prohibited from giving legal advice or written opinions to any other than the officers or persons named herein.

TEX. REV. CIV. STAT. ANN. ART. 4399 (repealed and recodified at TEX. CIV. PRAC. & REM. CODE §§ 402.044-402.045).

§ 402.041. Definition

In this subchapter "opinion" means advice or a judgment or decision and the legal reasons and principles on which it is based.

TEX. CIV. PRAC. & REM. CODE § 402.041.

§ 402.045. Limitation

The attorney general may not give legal advice or a written opinion to a person other than a person named in this subchapter.

TEX. CIV. PRAC. & REM. CODE § 402.045.

Art. 4411. [4429] [2902] [2807] No admission to prejudice.

No admission, agreement or waiver, made by the Attorney General in any action or suit in which the State is a party, shall prejudice the rights of the State.

Acts 1846, p. 206; P.D. 211; G.L. vol. 2, p. 1148. TEX. REV. CIV. STAT. ANN. ART. 4411 (repealed and recodified at TEX. GOV'T. CODE 402.004.

TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

RULE 1.06 CONFLICT OF INTEREST: GENERAL RULE

(a) A lawyer shall not represent opposing parties to the same litigation.

(b) In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:

. . .

(2) reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests.

. . .

(e) If a lawyer has accepted representation in violation of this Rule, of if multiple representation properly accepted becomes improper under this Rule, the lawyer shall promptly withdraw from one or more representations to the extent necessary for any remaining representation not to be in violation of these Rules.

(f) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member or associated with that lawyer's firm may engage in that conduct.

(Adopted eff. Jan. 1, 1990.) TEX. DISCIPLINARY R. PROF. CONDUCT 1.06

Supreme Court, U.S
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(2)

No. 93-871

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

SHAROLYN WOOD,

Cross-Petitioner,

v.

ATTORNEY GENERAL OF TEXAS, *et al.*,

Cross-Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO WOOD'S CROSS-PETITION FOR WRIT OF CERTIORARI

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December 21, 1993

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QUESTION PRESENTED

Whether the Fifth Circuit appropriately recognized the elected Attorney General of Texas as the attorney for the state and its officials who were sued only in their official capacities in a voting rights challenge to the state's system for electing trial judges?

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BRIEF IN OPPOSITION TO WOOD'S CROSS-PETITION FOR WRIT OF CERTIORARI

The cross-petition opposed in this brief ("Wood's cross-petition") is the third of three filings seeking review of a judgment and opinion of the Fifth Circuit in a voting rights challenge to the state of Texas's system for electing its trial judges. The first filing, raising both substantive voting rights and settlement issues, was through a petition for writ of certiorari in *League of United Latin American Citizens Council No. 4434 v. Attorney General of Texas*, No. 93-630 ("*LULAC*"). The second filing, raising only settlement issues, was through a cross-petition for writ of certiorari in *Attorney General of Texas v. Entz*, No. 93-813.

Wood's cross-petition offers no clearer description of the designated respondents than that they are the

Attorney General of Texas and unspecified others. As expressed in each of his earlier filings in Nos. 93-630 and 93-813, the state's Attorney General represents fifteen official-capacity parties, including himself.[1] Wood's position in this case is such that the Attorney General himself both as an official-capacity party and as attorney for all the official-capacity state parties is targeted by Wood. Therefore, this brief in opposition is filed on behalf of the state and the Attorney General as cross-respondents.

OPINIONS BELOW

The opinions below are reproduced in the appendices to the *LULAC* petition and the state's Memorandum Response in No. 93-630.

STATEMENT OF THE CASE

The Statement of the Case at pages 2-6 of the state's Memorandum Response in No. 93-630 canvasses the case and will not be replicated here. No further development of the case really is required for the Court to dispose of the question presented by Wood's cross-petition; yet, mindful of the Court's Rule 15.1 admonition that any perceived misstatements of law or fact potentially bearing on the issues be addressed in briefs such as this one, the Attorney General and the state elaborate as follows.

Both Judge Wood of Harris County and Judge Entz, her

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[1] The representation of one official-capacity state respondent -- the Chief Justice sitting as chair of the state Judicial Districts Board -- is in dispute, with a private attorney purporting to represent him. Inasmuch as the Attorney General represents the state and the state is the real party in interest, *see Kentucky v. Graham*, 473 U.S. 159 (1985), the Attorney General asserts that he is the Chief Justice's proper attorney here. *See Attorney General of Texas v. Entz*, Cross-Petition, No. 93-813, at 9-10.

Dallas County counterpart, intervened in their personal capacities. The Fifth Circuit did not grant their efforts to extend their interventions to encompass counties other than the ones where they reside or to transform their interventions into official-capacity ones. Neither of them has asked this Court to review the Fifth Circuit's intervention decisions as to them. Therefore, they are before this Court only in their personal capacities and (at most) only as to their two counties of residence. *See Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Phillips Corp.*, 114 S.Ct. 425 (1993) (holding that circuit court intervention denial as to which review is not sought in this Court limits putative intervenors' standing to that which it had in lower appellate court).

The main thrust of Wood's statement of the case in her cross-petition is to deride the state's attorney who argued the state's case when it first came before this Court in *Houston Lawyers' Association v. Attorney General of Texas*, 111 S.Ct. 2376 (1991), for presenting a "wholly new and incomprehensible argument." Wood Cross-Pet. at 7. The argument, premised on the plain statement rule for extension to core state functions of congressional enactments under section 5 of the Fourteenth Amendment, was not wholly new, having been fully briefed to the Fifth Circuit in the first round of appeals in this case. As to its incomprehensibility, it is clear that this Court did not find it incomprehensible inasmuch as the argument's premises were adopted by this Court in an opinion issued the same day as the *HLA* decision, *Gregory v. Ashcroft*, 111 S.Ct. 2395 (1991), in a case in which the parties' briefs did not appear to make that argument.[2]

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[2] Another example of Wood's misguided *ad hominem* attacks in support of her cross-petition is in her elided quote from the *HLA* oral argument by the state's counsel. Wood Cross-Pet. at 7. The transcript of the argument reflects that all that was being explained was that defense counsel found it difficult to place himself in plaintiff counsel's shoes in assessing a hypothetical question. Tr. 53.

Finally, given the tenor of Wood's factual recitation, it is worth reiterating that the Attorney General has never sought to arrogate to himself the authority to determine the future direction of Texas's judicial selection system. In this case, he has done nothing more than agree with the plaintiffs that the federal trial court should be permitted to conduct a hearing on a proposed settlement at which Judge Wood and whoever else so chooses may make their views known and present evidence. It is this conduct, of proposing a hearing on a settlement of a long and bitterly fought suit involving highly-charged public policy issues, that Wood argues to the Court violates six federal and seven state constitutional provisions, not to mention three state statutes. Wood Cross-Pet. at 5-6 n.1.

REASONS FOR DENYING THE WRIT

This private party, with either no justiciable interest or limited to defending at most one of ten targeted county electoral systems and lacking standing to assert any of the constitutional rights for which she provides even a modicum of argument, points to no decisional conflicts and no important federal jurisprudential rules implicated by the Fifth Circuit disposition of the motions she seeks to have this Court review.

The Fifth Circuit, which wrote an unusually long and elaborate opinion on both the voting rights merits and settlement issues, was able to dispose of Wood's motions to realign and disqualify the Attorney General in one short paragraph. LULAC App. 17a-18a. Judge Wood has failed to present the Court with a single conflicting appellate opinion on this point or a single important policy of federal jurisprudence which the Fifth Circuit's disposition of her motions calls into play.

Her blunderbuss attack on the Fifth Circuit relies on the Guarantee Clause of the Constitution, the Tenth Amendment, and the separation of powers doctrine. In the capacity in which she appears before this Court -- her personal capacity -- she cannot even raise a claim under the Guarantee Clause, because it does not provide enforceable *private* rights. *Pacific States Telegraph & Telephone Co. v. Oregon*, 223 U.S. 118 (1912).

The Tenth Amendment, to the extent it can provide an independent constitutional ground for statutory invalidation, operates as a limitation on *federal* power (which is not called into question by Judge Wood), not state power; moreover, like the Guarantee Clause, it is assertable by a state, not by a private individual. *Cf. New York v. United States*, 112 S.Ct. 2408 (1992). It is incomprehensible how the Attorney General's joint motion with the plaintiffs to remand this case to the district court implicates the Tenth Amendment in any fashion.

The final basis for Judge Wood's effort to obtain review of the Fifth Circuit's rebuff of her effort to cast aside the state's elected Attorney General as the state's attorney is listed as the separation of powers doctrine. Yet, nowhere in the text of her cross-petition is there any discussion of the doctrine, any citation to case authority explicating the doctrine, or any explanation of how a state official's handling of the defense of a challenged state electoral system implicates a federal constitutional doctrine which concerns the relations of the three *federal* branches of government.

Judge Wood's effort is a feeble one. In fact, it is so feeble, and so groundless, that it does not appear really to be a serious effort at obtaining review on the questions it purports to present to the Court. Rather, it seems to offer an excuse for the leveling of questionable

accusations against the Attorney General in order to harden the Court's attitude towards the merits of the settlement issues presented for review in Nos. 93-630 and 93-813. Those petitions, however, should be evaluated on their own merits, not by the quality of questions presented in Wood's cross-petition.

Judge Wood either has no judicially recognized standing to assert the constitutional rights forming the basis of the question she presents for review, or she offers absolutely no authority or discussion of a right which seems wholly inapplicable to the instant situation. Furthermore, she has offered no authority in conflict with the complained-of Fifth Circuit action and no coherent explanation of how that action implicates any important federal issues.

CONCLUSION

For the foregoing reasons, the Court should deny Wood's cross-petition for writ of certiorari.

Respectfully submitted,

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS LEAGUE OF LATIN AMERICAN CITIZENS, COUNCIL NO. 4434, et al.

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4 pp

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS LEAGUE OF LATIN AMERICAN CITIZENS, COUNCIL NO. 4434, et al.

Respondents, Latin American Citizens, Council No. 4434, et al., petitioners in No. 93-630, urge that the cross-petition of Judge Sharolyn Wood be denied even in the event that this Court grants certiorari in Nos. 93-630 and 93-928.

Simply stated, the cross-petition presents no issue that is worthy of a grant of certiorari. The petitioner is dissatisfied with the position that the Attorney General of Texas and other duly elected state officials have taken in this litigation. The State officials wish to exercise their legal authority to seek a settlement; petitioner wants them to fight to the end. However, the premise upon which the cross-petition is based — that a defendant's decision to settle a case makes the litigation "collusive" — is wrong.

As described in detail in the cross-petition for a writ of certiorari in No. 93-928, this case has been vigorously defended by the State all the way to this Court. Settlement negotiations were extensive, and an agreement — subject to a hearing and approval by the district court — reached that reflected a careful balancing of the competing interests at stake.

Cases are settled routinely and, as we have pointed out in the petition for a writ of certiorari in No. 93-630, this Court has consistently made it clear that settlements are favored under federal law.[1] The fact that the Attorney General has decided that it is in the best interests of the State of Texas to settle does *not* lead to the conclusion that that official has abandoned his duty to represent the State or allow or even permit a federal court to make such a judgment.

Finally, if certiorari is granted in No. 93-630 and/or No. 93-928, Judge Wood will have every opportunity to make her views known on every issue, as she has been able to do at every stage of the litigation of this case to date.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

---

[1] *See, e.g., Evans v. Jeff D.*, 475 U.S. 717 (1986); *Marek v. Chesny*, 473 U.S. 1 (1985).

Respectfully submitted,

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